MOTION FILED OCT 15 1955

No. 13, Orig.

In The

Supreme Court of the United States

October Term, 1955

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF TENNESSEE,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT, PROPOSED COMPLAINT, AND BRIEF

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THE GILMAN PRESS, MADISON, WISCONSIN

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No.....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1955

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF TENNESSEE,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

TO THE HONORABLE
THE SUPREME COURT OF THE UNITED STATES

Now comes the State of Wisconsin by Vernon W. Thomson, Attorney General of said state acting under the authorization of the Honorable Walter J. Kohler, Governor of the State of Wisconsin, and moves the court for leave to file the complaint herewith exhibited in a controversy which has arisen between the State of Wisconsin, complainant herein, and the State of Tenessee, the defendant herein, each of which is a sovereign state of these United States, concerning an attempt of the said defendant by means of a statute enacted in due form of law in accordance with the laws and constitution of the State of Tennessee to obstruct interstate commerce in fluid milk and allied

products between the State of Wisconsin and the State of Tennessee.

Dated: October 14, 1955.

Vernon W. Thomson /s/
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No.....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1955

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF TENNESSEE,

Defendant.

COMPLAINT

The State of Wisconsin by its Attorney General Vernon W. Thomson, acting under the authorization of the Honorable Walter J. Kohler, Governor of Wisconsin, for cause of action against the State of Tennessee, respectfully represents and alleges to this Honorable Court:

PARTIES

1. The State of Wisconsin is one of the 48 sovereign states of the United States of America having its principal place of business at the State Capitol, Madison 2, Wisconsin, and was duly organized and admitted to the Union of the United States of America on May 29, 1848.

2. The State of Tennessee is one of the 48 sovereign states of the United States of America having its principal place of business at the State Capitol, Nashville, Tennessee, and was duly organized and admitted to the Union of the United States of America on June 1, 1796.

JURISDICTION

3. This is an action arising under the provisions of Art. I, sec. 8, clause 3 of the United States Constitution which confers upon the Congress the power "to regulate commerce * * * among the several states * * *."

4. The forum for this action is established by Art. III, sec. 2, of the United States Constitution which provides that in those cases in which a state shall be a party the Supreme Court of the United States shall have original jurisdiction, and by Title 28, sec. 1251 (a) (1) of the United States Code which provides that such jurisdiction shall be exclusive.

STATEMENT OF CLAIMS

5. The State of Wisconsin brings this action in its sovereign capacity to protect a two-fold interest. (1) As parens patriae or representative of the people of the State of Wisconsin and particularly the dairy industry of the state whose sales of milk in interstate commerce would be prejudicially affected and prohibited by the Statutes of the State of Tennessee herein complained of; and (2) in its capacity of sovereign responsible for the perform-

ance of governmental functions which can only be paid for out of its tax revenues which are derived in large part from taxes upon its citizens and residents in the State of Wisconsin directly engaged in the dairy industry or dependent thereon.

The persons in this state engaged in the dairy industry or directly dependent thereon include a substantial portion of the state's population. This is a matter of great public concern in which the state in its capacity as parens patriae has an interest apart from that of the individuals affected.

6. The State of Tennessee by its sovereign and official act, acting in due form of law and in accordance with its own constitution, has promulgated as a law of the State of Tennessee Public Chapter No. 74 of the Laws of Tennessee of 1955, which became effective after passage by the legislature on February 22, 1955, and approval by the Governor on February 28, 1955. The provisions of Publice Chapter No. 74 of the Laws of Tennessee of 1955, a copy of which is hereto annexed and marked "Exhibit A" and herein incorporated by reference, are designed to and will, unless restrained by this Honorable Court, hamper, impede and destroy interstate commerce in milk between the producers in the State of Wisconsin, and the consuming public in the State of Tennessee.

7. The State of Tennessee in due form of law has made provisions for the enforcement of said chapter 74, and by its responsible officials has threatened to and will, unless restrained by this Honorable Court, enforce the provisions of said law against the assemblers and processors of the State of Wisconsin who attempt to ship milk

produced in Wisconsin in interstate commerce into the State of Tennessee.

8. That the provisions of ch. 74, Laws of Tennessee of 1955, will effectively hamper, impede and destroy interstate commerce in milk and allied products produced in the State of Wisconsin by discriminating against such milk and allied products in the following manner:

(a) Persons producing, assembling and processing milk in a marketing area in the State of Tennessee, and which marketing area has carefully been defined to exclude persons residing in the State of Wisconsin, are permitted to sell their milk in such marketing area without any restriction whatsoever based on the prevailing market price.

(b) Persons assembling and processing fluid milk outside of a marketing area in the State of Tennessee, including all persons residing in the State of Wisconsin, are effectively prohibited from selling Wisconsin produced milk in Tennessee at less than some established prevailing price by a provision in the act that such sale is prima facie evidence of a punishable offense against the laws of the State of Tennessee, that is, a sale of milk with an intent to injure or destroy competition or to create a monopoly.

(c) That by such classification which is arbitrary and capricious, based upon no reasonable grounds which are germane to the purpose of the Tennessee law, and which are a denial of the equal protection of the laws to the persons involved, the law gives a competitive advantage to local products and local producers and discriminates against producers in the State of Wisconsin and all other producers

located outside of the State of Tennessee market area. This result inevitably follows from the fact that Wisconsin produced milk is generally assembled and transported by persons other than producers, and milk other than grade A cannot be shipped in interstate commerce until it is treated to the process of pasteurization under the approval of the United States Public Health Service.

9. That the assembling and processing of milk produced in Wisconsin for transportation in interstate commerce is a competitive business, and that the sale of fluid milk and allied products in Tennessee by Wisconsin processors at a free and unrestricted market price will not tend to create a monopoly or to injure or destroy competition.

10. No significant quantity of bulk milk is transported and delivered for sale in Tennessee by Wisconsin producers of milk who would come within the exemption of sec. 4 of Public Chapter No. 74, Laws of Tennessee of 1955; none could be for the reasons stated in paragraph 8 of this complaint, that such milk transported in interstate commerce is either assembled, transported and sold by others or would have to be treated to the process of pasteurization, which processing would render the exemption of said section 4 inapplicable.

11. The production, processing, distribution and sale of milk and milk products is a substantial industry in the State of Wisconsin. The number of dairy farms in Wisconsin in 1954, each supporting at least one family, was 107,316. The number of producing dairy cattle in the State of Wisconsin on January 1, 1955, was 2,656,000 and the total number of all cattle was 4,318,000.

The dairy industry is the second most important industry in the State of Wisconsin in terms of income pro-

duced. The following figures for the year 1954 illustrate the size and importance of the industry:

Total volume of milk produced ....16,550,000,000 pounds

Total value of milk produced $534,565,000.00

Total volume of fluid milk shipped
in interstate commerce .....1,059,292,000 pounds

Total volume of butter fat shipped
in interstate commerce .....28,592,000 pounds

12. That substantial quantities of milk produced in Wisconsin have been sold in Tennessee. That such sales will be directly hampered, impeded and destroyed by discrimination against interstate commerce under the provisions of Public Chapter 74, Laws of Tennessee of 1955. That the continuance of such sales and the development and expansion of the market on terms and prices favorable to the consumers in Tenneesse and the producers in Wisconsin are directly dependent upon the development of competitive prices which allow the consumers in Tennessee to increase their purchases of fluid milk for consumption to the maximum which can be efficiently produced, processed and delivered by the dairy industry of Wisconsin.

That the use of fluid milk for human consumption, particularly by children, is the highest use to which such fluid milk can be devoted, and brings a better return to the producer than the use of milk for the manufacture of other milk products. That any interference with the development of the widest possible market for fluid milk to be used for human consumption directly and substantially affects the income of the entire dairy industry of the State

of Wisconsin, and tends to depress the price in Wisconsin of all milk, including that for consumption as fresh fluid milk.

That the owners and operators of the 107,000 dairy farms in Wisconsin constitute a substantial portion of the state population and with their families constitute about one-seventh of the total population. Their health, comfort and welfare are seriously threatened when their livelihood is jeopardized by any interference with the widest sale of milk in the stream of interstate commerce. This is a matter of grave public concern in which the state, in its capacity as parens patriae, has an interest apart from that of the individuals affected.

13. That the state in its sovereign capacity carries out its governmental functions with moneys raised by both income and property taxation upon its citizens and residents. The impairment of the income of the second largest industry in the state will have a prejudicial and adverse effect upon the revenues of the state itself, and impair its ability as sovereign to carry out its governmental duties.

14. Public Chapter No. 74, Laws of Tennessee of 1955 is invalid in that: (a) it is a usurpation of the powers granted exclusively to the Congress in Art. I, sec. 8, clause 3, to regulate commerce among the several states; (b) it is a violation of the Fourteenth Amendment to the Constitution of the United States in that it denies to processors from Wisconsin desiring to sell milk in a Tennessee milk marketing area the equal protection of the laws.

WHEREFORE, THE PLAINTIFF PRAYS:

(a) That Public Chapter 74, Laws of Tennessee of 1955 be declared unconstitutional;

(b) That the State of Tennessee be perpetually restrained and enjoined from enforcing the said Public Chapter 74;

(c) For such other and further relief as this court may deem just and equitable.

Dated: October 14, 1955.

Vernon W. Thomson /s/
VERNON W. THOMSON
Attorney General of Wisconsin

Stewart G. Honeck /s/
STEWART G. HONECK
Deputy Attorney General

Roy G. Tulane /s/
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"EXHIBIT A"

PUBLIC CHAPTER NO. 74

HOUSE BILL NO. 389

By James I. Bell

An Act to regulate the sale of milk and milk products.

Section 1. *Be It Enacted by the General Assembly of the State of Tennessee,* That it shall be unlawful for any person, with the intent to injure or destroy competition, or with the intent to create a monopoly, to do any of the following acts, and proof of such act shall constitute prima facie evidence of such intent;

(a) To sell, advertise, or offer for sale within any marketing area, at wholesale or retail, for less than the prevailing wholesale or retail price at the place of sale, any of the following-named products; market milk; pasteurized milk; Vitamin-D milk; homogenized milk; chocolate milk; skimmilk or skimmed milk; buttermilk; cultured buttermilk; flavored milk or milk drinks, recombined or reconstituted pasteurized milk; homogenized milk; Vitamin-D milk; chocolate milk; skimmed milk and cultured buttermilk; sweet cream, whipping cream; homogenized cream (as such milk products are defined in Section 547.2 of the Supplement to the Code of Tennessee), or any products made by increasing the butter fat content of market milk, pasteurized milk, homogenized milk or vitamin-D milk; that have been prepared or processed for resale, and have been transported into said marketing area from any point

outside of said marketing area, provided that the provisions of this paragraph (a) shall not apply to bids made in response to invitations from state, county, and municipal institutions and contracts and deliveries made pursuant thereto.

(b) To give, offer to give, or accept any discount, rebate, free service or services, advertising allowances, donation, financial aid, free equipment, or any other thing of value as an inducement to the purchase of any of the products referred to in paragraph (a), whether such products have been transported into a marketing area or not.

(c) To offer for sale or sell at a combined price any product referred to in paragraph (a) with any other commodity or commodities, or service or services, which is less than the aggregate of the prices for which such product and other commodity or service are offered for sale, whether such product has been transported into a marketing area or not.

(d) To sell within any marketing area, at wholesale or retail, any product referred to in paragraph (a), whether the same has been transported into the marketing area or not, for less than cost to the seller. Competent evidence of the prevailing cost to other such sellers within the marketing area shall constitute prima facie evidence of the cost to any seller charged with violating this provision.

Section 2. *Be It Further Enacted,* That for the purposes of this Act a marketing area shall be a county in which there is located a municipality having an ordinance regulating the grading of milk and milk products. In ad-

dition to such marketing areas the Commissioner of Agriculture shall have authority to designate other marketing area, each of which may be composed of one or more counties, when in his opinion market conditions require such designation.

Section 3. *Be It Further Enacted,* That violation of this Act shall be a misdemeanor, punishable by a fine not to exceed Three Hundred ($300.00) Dollars, or imprisonment not to exceed three months, or both fine and imprisonment in the discretion of the court. In addition to the criminal penalties herein provided, violation of this Act may be enjoined at the suit of any person aggrieved or about to be aggrieved thereby, or at the suit of the Comissioner of Agriculture.

Section 4. *Be It Further Enacted,* That this Act shall not apply to producers of milk who sell bulk milk to processors or manufacturers and who do not themselves process or manufacture milk or milk products. In the event a producer does process or manufacture milk or milk products, the Act shall not apply with respect to milk produced and sold on the premises where produced.

Section 5. *Be It Further Enacted,* That if any portion of this Act be held to be unconstitutional, such portion shall be elided and said holding shall not affect the remainder of the Act, it being the legislative intent to pass the valid portions of the Act without such unconstitutional portions.

Section 6. *Be It Further Enacted,* That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed: February 22, 1955.

JAMES L. BOMAR,
Speaker of the House of Representatives.

JARED MADDUX,
Speaker of the Senate.

Approved: 2-28-55.

FRANK G. CLEMENT,
Governor.

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No.....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1955

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF TENNESSEE,

Defendant.

BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

By a motion for leave and proposed complaint filed herewith the State of Wisconsin seeks to invoke the original jurisdiction of this Honorable Court in an action against the State of Tennessee. This brief is tendered in support of the motion.

JURISDICTION

The parties to this proceeding are both sovereign states of the United States of America. Jurisdiction to hear this case as an original proceeding in the Supreme Court of the United States is conferred upon this Honorable Court by the provisions of Article III, section 2, clause 2 of the United States Constitution.

Exclusive jurisdiction to hear this proceeding is vested in this Honorable Court by the provisions of Title 28, §1251 (a) (1), of the United States Code.

Jurisdiction of this court further depends upon the existence of a justiciable controversy within the meaning of Art. III, section 2, between the parties to this proceeding. The existence of such a controversy will be discussed in the argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. III, section 2, clause 2 of the United States Constitution reads:

> "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. * * *"

Art. I, section 8, clause 3:

> "The Congress shall have power
>
> "* * *
>
> "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

Art. XIV, section 1:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28, §1251 (a) (1) U. S. C., 62 Stat. 927:

"(a) The Supreme Court shall have original and exclusive jurisdiction of:

"(1) All controversies between two or more States;"

Public Chapter No. 74, Laws of Tennessee of 1955 (not yet published in bound form).

The provisions of Public Chapter No. 74 are rather lengthy and are printed as Exhibit A to the complaint (pages 11-14, *ante*) filed herewith.

In substance, said Public Chapter No. 74 allows persons, including processors, residing in a market area as defined in the laws of Tennessee to engage in unrestricted sales in that area without reference to the prevailing price.

The statute then provides that any processors from outside of the market area who sell for less than the prevailing price are prima facie guilty of an offense against the laws of Tennessee and are subject to criminal prosecution, with penalties of fine or imprisonment.

QUESTION PRESENTED FOR REVIEW

Does a Tennessee Statute which allows residents of a marketing area in Tennessee to sell milk and milk products below a prevailing price without restriction, but subjects residents of the State of Wisconsin who make sales below said prevailing price to a threat of prosecution, constitute:

(1) A direct and undue burden on interstate commerce, or

(2) A denial of the equal protection of the laws to persons from the State of Wisconsin who go to Tennessee for the purpose of selling their milk?

A STATEMENT OF THE CASE

(a) *The statute involved*

This proceeding arises out of the enactment into law by the State of Tennessee of Public Chapter No. 74, Laws of Tennessee of 1955. Public Chapter No. 74 was passed by the legislature of Tennessee on February 22, 1955 and approved by the Governor of Tennessee on February 28, 1955. Thereupon the law became effective as a statute of the State of Tennessee.

Chapter No. 74 consists of 6 sections. In the declaration of purpose in the first paragraph of Section 1, the statute purports to be directed against acts which would injure or destroy competition, or create a monopoly. However, the proscription in said Section 1 is directed against certain specific named acts, and proof of the act alone is made prima facie evidence of an intention to injure or destroy competition, or to create a monopoly.

Paragraph (a) of section 1 provides in substance that any person who shall sell milk or milk products in any marketing area for less than the wholesale or retail price at the place of sale, when such milk has been prepared or processed for resale and transported into the marketing area from any point outside of the marketing area, has committed a proscribed act. This is shown by the following

shortened quotations from said paragraph (a) which describes the unlawful act:

> "To sell * * * within any marketing area, at wholesale or retail, for less than the prevailing wholesale or retail price at the place of sale, any of the following named products; market milk [now here follow detailed descriptions of various other kinds of fluid milk, butter milk and cream] that have been prepared or processed for resale, and have been transported into said marketing area from any point outside the said marketing area * * *."

The clear import of this language is that any milk which has been prepared or processed for resale outside of the marketing area is subject to the restriction or requirement that it be sold at not less than the prevailing market price within the given market area, while milk prepared or processed for resale *within* the market area is not subject to such restriction and may be sold at a lower price.

Further, in subsection (e) a proscription is levied against a sale within a marketing area for less than cost to the seller. However, the final sentence of said subsection (e) which reads: "Competent evidence of the prevailing cost to other such sellers within the marketing area shall constitute prima facie evidence of the cost to any seller charged with violating this provision," creates a marketing condition under which the more efficient producers and processors are held to the cost standard of other sellers who are less efficient and are thereby threatened with the possibility of criminal prosecution if they make sales based on their own cost.

Section 2 of the act provides generally for the definition of a marketing area as a county in which there is located a municipality having an ordinance regulating grading of milk and milk products. Further, the Commissioner of Agriculture is given power to designate other marketing areas under the sole standard "when in his opinion market conditions require such designation."

Section 3 of the act provides that a violation of the act shall be a misdemeanor punishable by a fine not to exceed $300 or imprisonment not to exceed 3 months, or by both such fine and imprisonment.

Section 4 of the act exempts from its provisions producers of milk who sell bulk milk but who do not themselves process or manufacture milk or milk products.

As set forth in the complaint, practically all fluid milk from Wisconsin is assembled, transported and sold by persons other than the producer, or must be pasteurized prior to transportation, and hence the exemption of producers is in practice inoperative.

Sections 5 and 6 are general clauses providing for severability and for the effective date of the Act.

(b) *The effect of the statute*

By force of its own terms the statute clearly provides that a processor transporting milk into a marketing area in the State of Tennessee from any point outside that marketing area, and thereby including all processors in the State of Wisconsin, is subject to a criminal prosecution if he offers his milk for sale at wholesale or retail at less

than some prevailing market price to be determined by Tennessee officials, while processors residing in the market area are subject to no similar restriction and are free to undercut the so-called prevailing market price and to offer their milk for sale at a price lower than that required of processors from the State of Wisconsin, and hence as against the processors of the State of Wisconsin would be able to gain a monopoly on sales.

(c) *The importance of free interstate commerce in milk to the State of Wisconsin*

The facts which establish the State of Wisconsin as one of the leading dairy states of the United States and in large part dependent upon the interstate sale of its milk and milk products are set forth in the complaint. These facts are:

1. The production, processing, distribution and sale of milk and milk products is a substantial industry in the State of Wisconsin.

2. The dairy industry is the second most important industry in the State of Wisconsin in terms of income produced.

3. Substantial quantities of milk produced in Wisconsin have been sold in Tennessee.

4. The number of dairy farms in Wisconsin in 1954 was 107,316.

5. The number of producing dairy cattle in the State of Wisconsin on January 1, 1955 was 2,656,000 and the total number of all cattle was 4,318,000.

6. The total volume of milk produced in 1954 was 16,550,000,000 pounds.

7. The total value of the milk produced in 1954 was $534,565,000.

8. The total volume of fluid milk shipped in interstate commerce in 1954 was 1,059,292,000 pounds.

9. The total volume of butterfat shipped in interstate commerce in 1954 was 28,592,000 pounds.

The facts stated in the complaint further show that if the dairy industry of the State of Wisconsin is prevented from developing the widest possible market in interstate commerce for its milk and milk products, the producers of milk in the entire dairy industry in Wisconsin will suffer substantial monetary loss, and in fact the revenues of the State itself will be impaired.

Further, by virtue of the size of the dairy industry which includes at least one-seventh the total population of Wisconsin, this is a matter of grave concern in which the State in its sovereign capacity and as parens patriae has an interest entirely apart from that of the individuals affected.

Further reference to the facts will be made during the course of the argument.

ARGUMENT

I. THE STATUTE OF THE STATE OF TENNESSEE HEREIN COMPLAINED OF PLACES A DIRECT AND UNDUE BURDEN ON INTERSTATE COMMERCE IN MILK WITH THE STATE OF WISCONSIN.

The facts establish that processors for sale of milk residing in a market area in the State of Tennessee enjoy an unrestricted right to sell their milk at wholesale or retail at any price they please, and to undersell their competitors.

Wisconsin producers and processors on the other hand are effectively prohibited from meeting the competition of these unrestricted sales, and required to sell at some so-called prevailing market price to be determined in some manner by Tennessee officials. This is nothing but "price fixing" on the sales of processed milk in interstate commerce. Worse, it is a discriminatory price fixing. Under the laws established by this Honorable Court, such action is clearly beyond the powers of the several states.

In the leading case of *G. A. F. Seelig, Inc. v. Baldwin*, (1935) 294 U. S. 511, the State of New York under its New York Milk Control Act (New York Agriculture and Market Law, art. 21-A, par. §258-m (4), New York Laws 1934, ch. 126) attempted to prohibit the sale of milk in the State of New York which had been brought from outside the state unless the price paid to the producers outside the state was the same price as would be lawful upon a like transaction within the State of New York. The court speaking through Mr. Justice Cardozo, after fully analyzing the question, held that the New York Act was an unlawful interfer-

ence with interstate commerce and was invalid. The court held that New York State could not restrain the sale of milk purchased in another state, (1) whether the milk is sold in the original cans in which it is brought into New York, or (2) whether the milk is re-bottled in New York and then sold.

After defining the exact nature of New York's claim of power as an assertion that it was entitled to outlaw milk from a foreign state by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to the farmers in New York, the opinion continued at 294 U. S. 521-522:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibition of the Constitution, beyond the power of a state, 'except what may be absolutely necessary for executing its inspection laws.' Constitution, Art. I, §10, clause 2; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, §8, clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' International Textbook Co. v. Pigg, 217 U. S. 91, 112, 54 L. ed. 678, 687, 30 S. Ct. 481, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, and see Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 14 S. Ct. 829, 4 Inters. Com. Rep. 658; Brown v. Houston, 114

U. S. 622, 29 L. ed. 257, 5 S. Ct. 1091; Webber v. Virginia, 103 U. S. 344, 351, 26 L. ed. 565, 567; Kansas City S. R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 79, 58 L. ed. 857, 859, 34 S. Ct. 564. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; the Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, §259. If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

That opinion has never been reversed. It was cited with approval by the court in the majority opinion in the case of *Hood v. DuMond*, (1949) 336 U. S. 525 at pages 531-532. In the *DuMond* case the court stated at p. 532:

"The Constitution, said Mr. Justice Cardozo for the unanimous Court, 'was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' He reiterated that the economic objective, as distinguished from any health, safety and fair-dealing purpose of the regulation, was the root of its invalidity. The action of the

> State would 'neutralize the economic consequences of free trade among the states.' 'Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported.' 'If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.' * * *"

The *DuMond* case denied the power to interfere with the interstate shipment of milk on economic grounds.

In the case of *Dean Milk Company v. City of Madison*, (1951) 340 U. S. 349, a restriction on the sale of milk in interstate commerce, based on a health ordinance which the supreme court considered unreasonable, was held invalid.

The statute of Tennessee involved in the present case makes no pretense that it is a health or quarantine measure. If it is based on anything, it is based on pure economic considerations intended to protect a small class of persons in the State of Tennessee. This court has held so many times that, whatever regulation may be permissible in the field of interstate commerce, a direct discrimination against it is not permissible, that a multiplication of citations would appear to serve no useful purpose.

II. THE STATE OF WISCONSIN IS A PROPER PARTY PLAINTIFF TO BRING THIS ACTION IN ITS CAPACITY OF PARENS PATRIAE AGAINST THE STATE OF TENNESSEE TO ENJOIN THE ENFORCEMENT OF A STATUTE WHICH DISCRIMINATES AGAINST INTERSTATE COMMERCE.

Under the decided cases the facts as set forth in the complaint herein would appear clearly to establish that a justiciable controversy exists between the parties, for the resolution of which the original jurisdiction of this Honorable Court may be invoked. An interference with the livelihood of one-seventh of the population of a great state, and with the second largest industry in that state, with a direct annual income in excess of $500,000,000 would appear to establish the right of the state to proceed in its capacity as parens patriae under the principles established in *Georgia v. Pennsylvania Railway Company*, (1945) 324 U. S. 439, and *Pennsylvania v. West Virginia*, (1923) 262 U. S. 553.

These cases in turn are based on numerous similar cases which have recognized the right of a state to bring an original action to abate a nuisance: *Missouri v. Illinois*, (1901) 180 U. S. 208; *Kansas v. Colorado*, (1902) 185 U. S. 125; *New York v. New Jersey*, (1921) 256 U. S. 296; *Wyoming v. Colorado*, (1922) 259 U. S. 419; *Wisconsin v. Illinois*, (1929) 278 U. S. 367; and *Georgia v. Tennessee Copper Company*, (1907) 206 U. S. 230. To resolve questiions involving the diversion or overflow of water: *Kansas v. Colorado*, (1902) 185 U. S. 125, also (1907) 206 U. S. 46; *Connecticut v. Massachusetts*, (1931) 282 U. S. 660; *North Dakota v. Minnesota*, (1923) 263 U. S. 365. To enforce contracts between states: *Kentucky v. Indiana*, (1930)

281 U. S. 163; *Virginia v. West Virginia,* (1907) 206 U. S. 290.

In the case of *Georgia v. Pennsylvania Railroad Company,* supra, the state filed a bill charging a conspiracy against some 20 railroad companies. The essence of the complaint was a charge of conspiracy among the defendants in restraint of trade and commerce among the states based upon an arbitrary and noncompetitive fixing of railroad rates which was injurious to the state of Georgia. The damages as set forth in the complaint were that the result of the conspiracy was (p. 444):

> "'(a) to deny to many of Georgia's products equal access with those of other States to the national market;
>
> (b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;
>
> (c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and
>
> (d) to hold the Georgia economy in a state of arrested development.'"

After pointing out that Georgia had included a make weight allegation, and that it was injured as a proprietor, the court stated at p. 447:

> "* * * But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, parens patriae, are those arising from an alleged conspiracy of private persons

whose price-fixing scheme, it is said, has injured the economy of Georgia. Those rights are of course based on Federal laws. The enforcement of the criminal sanctions of these acts has been entrusted exclusively to the Federal government. See Georgia v. Evans, supra (316 US p. 162, 86 L ed 1350, 62 S Ct 972). But when it came to other sanctions Congress followed a different course and authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, parens patriae, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trusts acts."

And at page 450 the court stated:

"It seems to us clear that under the authority of these cases Georgia may maintain this suit as parens patriae acting on behalf of her citizens though here, as in Georgia v. Tennessee Cooper Co. supra (206 US p 237, 51 L ed 1044, 27 S Ct 618, 11 Ann Cas 488), we treat the injury to the State as proprietor merely as a 'makeweight.' The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. See Missouri v. Illinois, supra (180 US pp 219-224, 45 L ed 504-506, 21 S Ct 331); Virginia v. West Virginia, 246 US 565, 599, 62 L ed 883, 889, 38 S Ct 400. Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative. Missouri v. Illinois, supra (180 US p 241, 45 L ed 512,

21 S Ct 331); Georgia v. Tennessee Copper Co. supra (206 US p 237, 51 L ed 1044, 27 S Ct 618, 11 Ann Cas 488)."

And at page 451 the court stated:

"* * * If we denied Georgia as parens patriae the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction."

The court allowed the bill to be filed.

The case of *Pennsylvania v. West Virginia*, 262 U. S. 553 involved an attempt by the state of West Virginia to prohibit absolutely the export of natural gas from the state of West Virginia to the states of Pennsylvania and Ohio under certain circumstances. In this case the Supreme Court both granted permission to file a bill of complaint and granted an injunction against the enforcement of the state statute which attempted to affect the prohibition. In discussing the question of whether the complaint set forth a justiciable controversy, the court stated at pp. 591 and 592 as follows:

"The attitude of the complainant states is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a twofold interest,—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will

be similarly affected. Both interests are substantial and both are threatened with serious injury.

"Each state uses large amounts of the gas in her several institutions and schools,—the greater part in the discharge of duties which are relatively imperative. A break or cessation in the supply will embarrass her greatly in the discharge of those duties and expose thousands of dependents and school children to serious discomfort, if not more. To substitute another form of fuel will involve very large public expenditures.

"The private consumers in each state not only include most of the inhabitants of many urban communities, but constitute a susbtantial portion of the state's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law."

The court then went on to point out that natural gas was a lawful article of commerce, and that a state law which would prevent the transmission in such commerce of the gas was a regulation of interstate commerce and a prohibitive interference.

In the case of *Georgia v. Tennessee Copper Company*, 206 U. S. 230 the state of Georgia sued to join the copper company defendants from discharging noxious gases over the territory of the plaintiff state. In its opinion the court stated at 206 Wis. p. 238 as follows:

"It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not

be polluted on a great scale by sulphurous acid gas, that the forests on its mountains * * * should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law."

In the case of *Missouri v. Illinois,* supra, Missouri sued to enjoin the discharge of sewage by the state of Illinois into the Mississippi River, in order to prevent a continuing nuisance and danger to the health of the people of Missouri. This court granted leave to file the bill and declared that the nature of the injury complained of was such that an adequate remedy could be found only in the United States Supreme Court at the suit of the State of Missouri. In the water diversion cases, that is, *Kansas v. Colorado, Wyoming v. Colorado, Connecticut v. Massachusetts,* and *Wisconsin v. Illinois,* supra, this court has consistently held that a dispute between states over the allocation and use of waters flowing in rivers between the states was a proper subject for adjudication in the original jurisdiction of this court.

We respectfully submit that the statement of facts in the compalint shows that this is not a suit to enforce a penal law of the plaintiff state such as *Wisconsin v. Pelican Insurance Company,* (1888) 127 U. S. 265, or to enforce private right of a limited number of citizens such as the cases of *Oklahoma ex rel. Johnson v. Cook,* (1938)

304 U. S. 87; *Kansas v. United States*, (1907) 204 U. S. 331, *Oklahoma v. Atchison, Topeka and Santa Fe Railway Company*, 220 U. S. 227; *New Hampshire v. Louisiana*, 108 U. S. 76.

We respectfully submit that this case comes squarely within the principles laid down by this court in the case of *Pennsylvania v. West Virginia*, supra, where there was likewise an attempt by one state to interfere by statute with interstate commerce in a lawful article of commerce and that its right to proceed in its capacity as parens patriae is established both by that case and the subsequent case of *Georgia v. Pennsylvania Railroad*, supra.

III. THIS ACTION IS TIMELY BROUGHT.

While no allegation is made that any citizen or resident of the state of Wisconsin has been arrested under the Tennessee law, and that the state of Tennessee is actively enforcing its statute against the citizens of the state of Wisconsin, the cases appear to establish that a state need not sit idly by and wait till the damage is actually done before it proceeds against an invalid and discriminatory statute of another state. Producers and processors of milk in the state of Wisconsin should not be compelled to take their huge tank trailers of fluid milk to the state of Tennessee to risk an arrest and the destruction of their valuable cargo before a controversy would exist, of which the courts of justice would take cognizance.

The case of *Ex parte Young*, (1908) 209 U. S. 123, establishes that under proper circumstances jurisdiction of a court of equity will attach without requiring the

parties to subject themselves to harsh penalties and expenses of burdensome litigation.

The very existence of the statute on the law books of Tennessee represent a direct threat and a barrier to interstate commerce. The leading case on this point would appear to be *Pennsylvania v. West Virginia,* (1923) 262 U. S. 553.

In this case the state of Pennsylvania filed its motion for leave to comence an original action within 8 days after the West Virginia statute complained of had been passed. The statute had received no practical application and there had been no occasion for an attempt to enforce it. After stating these facts, the court said at page 593:

> "* * * But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant states apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

And again at page 594 after discussing other provisions of the act the court stated:

> "We regard it as entirely clear that the act is intended to compel the retention within the state of whatever gas may be required to meet the local needs for all purposes, and that its procedural, penal, and remedial provisions are amply adequate to accomplish that result. And we think it equally clear from the allegations in the bills, now established by the evidence, that the situation when the suits were brought was such that the act directly and immediately would work a large curtailment of the volume of gas moving into the

complainant states. Indeed, the conclusion is unavoidable that with the increasing demand in West Virginia, and the decreasing production, the act in a few years would work a practical cessation of the interstate stream."

In the present case the existence of the Tennessee statute today is a direct barrier to any Wisconsin producer or processor who would contemplate negotiating for or directing a shipment of milk to any of the marketing areas in Tennessee, and under the allegations of the complaint is directly operative to hamper, impede and destroy interstate commerce. It is a presently existing barrier to interstate commerce, and accordingly the filing of this motion for leave is timely within the authorities cited.

CONCLUSION

We respectfully submit that Public Chapter No. 74, Laws of Tennessee of 1955, is an unconstitutional and discriminatory interference with the interstate commerce which gravely affects the health, comfort and welfare of the people of the State of Wisconsin.

We respectfully submit that the facts set forth in the complaint clearly establish a justiciable controversy between the states, which under the prior authorities is a proper subject for an original action in this court.

We respectfully pray that the leave of this Honorable Court to file the proposed complaint be granted.

Dated: October 14, 1955.

Respectfully submitted,

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Certificate of Service

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the 14th day of October, 1955, he served the within and foregoing "Motion for Leave to File Complaint, Proposed Complaint and Brief" upon the sovereign State of Tennessee, the defendant in said action, in the following manner, as prescribed by Rules 9 and 33 of said Court:

He deposited at the post office at Madison, Dane County, Wisconsin, two copies each of the within and foregoing Motion, Complaint and Brief, securely enclosed in an envelope, air mail postage duly prepaid, addressed to each of the following officials of said defendant State respectively, at his post office address, as stated below, that is to say:

Honorable Frank G. Clement
Governor of the State of Tennessee
State Capitol
Nashville, Tennessee

Honorable George F. McCanless
Attorney General of the State of Tennessee
State Supreme Court Building
Nashville, Tennessee

.....

STEWART G. HONECK

DEC 19 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES.

No. 13, Orig.

OCTOBER TERM, 1955.

STATE OF WISCONSIN,
Plaintiff,

v.

STATE OF TENNESSEE,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT.

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SUPREME COURT OF THE UNITED STATES.

No. .....

OCTOBER TERM, 1955.

STATE OF WISCONSIN,
Plaintiff,

v.

STATE OF TENNESSEE,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT.

MAY IT PLEASE THE COURT:

The State of Wisconsin is endeavoring to invoke the original jurisdiction of this Court and has filed a motion for leave to file a complaint against the State of Tennessee, a proposed complaint, and a brief in support of the motion. The State of Tennessee opposes Wisconsin's motion for the reasons stated in this brief.

STATEMENT OF THE CASE.

The State of Wisconsin seeks to bring its action in a twofold capacity:

(1) as a parens patriae of its citizens and particularly its dairy industry, and

(2) in a proprietary capacity because of its interest in tax revenues which it intimates might suffer because of the Tennessee statute complained of.

The proposed complaint avers the extent and importance of the dairy industry in the State of Wisconsin and that Wisconsin producers sell substantial quantities of milk in the State of Tennessee. The proposed complaint further avers that Chapter 74 of the Public Acts of Tennessee of 1955 is invalid because violative of the commerce clause of the Federal Constitution, Article I, Section 8, clause 3, and because it denies equal protection of the laws to Wisconsin producers desiring to sell milk in Tennessee and is therefore in violation of the Fourteenth Amendment to the Constitution of the United States. The plaintiff prays that this Court declare that the statute in question is unconstitutional; that the State of Tennessee be enjoined from enforcing said statute; and for general relief. A copy of Chapter 74 of the Public Acts of Tennessee of 1955 is exhibited to the proposed complaint.

ARGUMENT

I. The Tennessee Statute Under Attack Does Not Place an Undue Burden on Interstate Commerce and It Does Not Deny to Wisconsin Producers and Shippers the Equal Protection of the Laws.

In its brief the State of Wisconsin takes the position that the Tennessee statute assailed is unconstitutional because it is a direct and undue burden on interstate commerce and it is a denial of the equal protection of the laws to persons from the State of Wisconsin who go to Tennessee for the purpose of selling their milk. The State of Tennessee takes the position that the statute is not unconstitutional for either of the reasons advanced by Wisconsin. The purpose of the statute is to make unlawful certain marketing practices, only if done within intent to injure or destroy competition or with intent to create a monopoly. Wisconsin seeks to infer that subsection (a) of Section 3 of the Act is applicable only to that milk that has been transported in interstate commerce, but such is not the case. This subsection prescribes the sale of certain milk products, if done with unlawful intent, at below the prevailing wholesale or retail price at the place of sale provided such products have been prepared or processed for resale, and have been transported into said marketing area from any point outside of said marketing area. Section 2 of the Act defines a marketing area as being a county in which there is located a municipality having an ordinance regulating the grade of milk and milk products. The Commissioner of Agriculture has authority to prescribe other marketing areas. It will thus be seen that subsection (a) of Section 3 is applicable to milk flowing exclusively in intrastate commerce if the milk is transported into a marketing area. The other restrictions in the Act clearly apply to intrastate as well as interstate

commerce because they are directed against certain practices whether the products have been transported into a marketing area or not. We therefore respectfully contend that by any reasonable construction of the Act it cannot be maintained that persons outside the State of Tennessee are denied the equal protection of the laws. The law is applicable to all who commit such acts as to bring themselves within its terms.

Neither is the statute invalid as being an undue burden on interstate commerce. In its contention to the contrary Wisconsin places strong reliance on the cases of **Baldwin v. Seelig,** 294 U. S. 511; **Hood v. DuMond,** 336 U. S. 525, and **Dean Milk Company v. City of Madison,** 340 U. S. 349. Analysis of these cases demonstrates that they are not authority for Wisconsin's contention. **Baldwin v. Seelig** dealt with an attempt by the State of New York to prevent the sale therein of milk that had been purchased from producers in Vermont at less than the price required to be paid to New York producers. This Court held such action invalid as a burden on interstate commerce. In **Hood v. DuMond,** the State of New York had denied a license for the establishment of a receiving plant from which milk was to be shipped in interstate commerce. This denial was based on the ground that operation of the plant would tend to destructive competition in a market that was already adequately served. This Court held that such action on the part of the State of New York violated the commerce clause. In **Dean Milk Company v. City of Madison** this Court struck down an ordinance prohibiting the sale of milk in Madison, Wisconsin, unless the same had been pasteurized within a radius of five miles of the municipality. Thus it will be seen that the cases relied upon by Wisconsin dealt with absolute barriers to the free flow of commerce between the States.

An entirely different situation is presented by the Tennessee statute now under attack. Here there is no pro-

hibition of the flow of milk into or out of the State of Tennessee. All that is required of out of State producers and shippers is that they do not engage in certain pricing practices which the State of Tennessee, in its sovereign capacity, has deemed to be harmful if done with monopolistic intent or with intent to injure or destroy competition. The statute is applicable to all alike and its effect on interstate commerce is only incidental. Persons who sell milk within the same market area in which it is produced are not unregulated, because they are forbidden to sell at less than cost to the seller. Subsection (d), Section 1, Chapter 74 of the Public Acts of Tennessee of 1955. By subsections (b) and (c) of the same Section other regulations are imposed upon the sale of milk, whether it has been transported into the marketing area or not. Here there is no rigid pricing system because no official of the State of Tennessee is vested with authority to fix the price at which milk may be sold. To the contrary, the Act is designed to the end that the price of milk seek its own normal level, unaffected by destructive, competitive practices. In the case of **Milk Control Board v. Eisinberg Farm Products**, 306 U. S. 346, this Court considered the validity of a statute which authorized the Milk Control Board to set prices paid to producers for milk. This Act was held not to be invalid even as it applied to that milk which was to be shipped in interstate commerce, because its burden on interstate commerce was only incidental. A similar situation was before this Court in the case of **Cities Service Gas Company v. Peerless Oil and Gas Company**, 340 U. S. 179, wherein this Court approved the action of the Oklahoma Corporation Commission in fixing prices for gas that was to be taken from a certain field, although such gas was to be transported in interstate commerce. In the case last cited, the Court said:

> "It is now well settled that a state may regulate matters of local concern over which federal authority

has not been exercised, even though the regulation has some impact on interstate commerce. Parker v. Brown, 1943, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315; Milk Control Board of Pennsylvania v. Eisenberg Farm Porducts, 1939, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752; South Carolina State Highway Dept. v. Barnwell Bros., 1938, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734. The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation. South Carolina State Highway Dept. v. Barnwell Bros., supra. Compare Leisy v. Hardin, 1890, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128, decided prior to the Wilson Act, 26 Stat. 313, 27 U. S. C. A., sec. 121, with In re Rahrer, 1891, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572, decided thereafter."

We respectfully insist that the Tennessee statute meets the requirements stated above. As already pointed out, Chapter 74 does not discriminate or place an embargo on interstate commerce. It is applicable to intrastate commerce as well, and it is not designed to erect any barriers against the products coming to Tennessee from other States. It safeguards an obvious State interest in that its purpose is solely to prevent those practices which are done with monopolistic, destructive or injurious intent. Clearly, this local interest outweighs whatever national interest there might be in permitting milk to be so shipped into and sold in the State of Tennessee, completely free from all regulation even of an incidental nature, and regulation which we submit is not unduly burdensome.

II. The State of Wisconsin Is Not a Proper Party Plaintiff to Bring This Action.

The State of Tennessee also takes the position that the State of Wisconsin is not a proper party plaintiff to bring this action. We begin with the well settled principle that only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity. **Alabama State Federation of Labor v. McAdory**, 325 U. S. 450.

This principle was given expression in **United Public Workers v. Mitchell**, 330 U. S. 75, in which certain governmental employees sought injunctive and declaratory relief against the Hatch Act, on the ground of its validity. This Court reached the merits of the case as to only one of the plaintiffs, holding that the others were not entitled to relief. The complaint, together with affidavits filed in support thereof, failed to state grounds for relief even though it was averred generally that these plaintiffs desired to engage in the type of political activity that was forbidden by the Act. The complaint here fails to state grounds for relief because of the absence of any allegation that any Wisconsin producers or shippers have done any act, and with the required intent, that would bring them within the terms of the statute. There is no allegation that the statute has impeded or diminished the flow of milk from Wisconsin into the State of Tennessee, nor is there any allegation that such milk, after reaching the State of Tennessee, is disposed of or desired to be disposed of in the manner made unlawful by the statute. We are not unaware of the holdings in **State of Georgia v. Pennsylvania Railroad Company**, 324 U. S. 439, and **Pennsylvania v. West Virginia**, 262 U. S. 553. The Georgia case was a suit to enjoin a conspiracy to fix freight rates, and there it was clear that the conspiracy was in existence and that the damage was being done. Pennsylvania v.

West Virginia dealt with an immediate and unequivocal threat to cut off the supply of gas to the complaining State. In each of those cases harm was done or threatened to the citizens of the plaintiff States regardless of anything that they might do or fail to do.

The situation here is entirely different because the Tennessee statute is not applicable to any person who does not perform certain acts with a certain intent. Tennessee does not insist that in order to test this law the citizens of Wisconsin must subject themselves to harsh penalties and the expenses of burdensome litigation. We do contend, however, that the well established rules of law with regard to the parties that may maintain suits be adhered to. The question of the right of a party to maintain a suit attacking the validity of this statute is a serious one that can be determined only after a searching and detailed inquiry. Such an inquiry can be conducted in the United States District Courts by any party who deems himself aggrieved by the Tennessee Act. Such a suit is now pending in the United States District Court for the Middle District of Tennessee at Nashville, and a transcript of the pleadings and orders in said suit is annexed to this brief as an exhibit. Obviously the character of inquiry necessary is ill-suited to the framework of an original proceeding in the Supreme Court of the United States. No reason suggests itself why the citizens of Wisconsin should not resort to their more adequate remedy in the local, Federal or State Courts. This suit is an obvious attempt to short-circuit the more orthordox procedures and deemphasize the question that should be considered at the very threshold of any judicial inquiry, does the plaintiff have a right to maintain the suit?

III. Under the Rules of Constitutional and Statutory Construction, the Motion Should Be Denied.

Under the well known rules of constitutional and statutory construction, this Court should deny Wisconsin's motion.

This Court, as well as the Supreme Court of Tennessee, has adopted the rule that where an act is capable of constitutional construction, it is the duty of the Court to so construe the statute to the end that it may be held constitutional rather than to the contrary. **Morrison v. Crews et al.** (1950), 192 Tenn. 20, 237 S. W. 2d 1; **United States v. Harriss,** 74 S. Ct. 808, 812, 347 U. S. 612; **Dennis v. United States,** 71 S. Ct. 857, 341 U. S. 494. It follows that an infraction of a constitutional provision is not to be assumed. This Court reasoned in **Corporation Commission of Oklahoma v. Lowe,** 50 S. Ct. 397, 281 U. S. 431, in discussing the Fourteenth Amendment in connection with a State statute, that, on the contrary, it is to be presumed that the state in enforcing its local policies will conform its requirements to the federal guaranties. At 50 S. Ct. 397, this Court declared:

> "Doubts on this point are to be resolved in favor of, and not against, the state."

This Court has also announced that it will presume that a statute couched in general terms is not intended to regulate that over which a state legislature had no authority. **Bank of the United States v. Halstead,** 23 U. S. 51, 10 Wheat. 213, 6 L. Ed. 606.

In determining whether the motion should be denied, the issue to be determined by the Court is whether any set of facts either known or which could be reasonably assumed affords support for the application of the statutes. **United States v. Carrolene Products Company,** 58 S. Ct. 278, 304 U. S. 144.

These rules poignantly demonstrate that the Court should indulge every intendment of constitutional and statutory construction in favor of the validity of the statute.

The plaintiff virtually concedes the futility of its position by the declarations made on page 37 of its brief in support of the motion. The plaintiff argues:

> "While no allegation is made that any citizen or resident of the state of Wisconsin has been arrested under the Tennessee law, and that the state of Tennessee is actively enforcing its statute against the citizens of the state of Wisconsin, the cases appear to establish that a state need not sit idly by and wait till the damage is actually done before it proceeds against an invalid and discriminatory statute of another state. Producers and processors of milk in the state of Wisconsin should not be compelled to take their huge tank trailers of fluid milk to the state of Tennessee to risk an arrest and the destruction of their valuable cargo before a controversy would exist, of which the courts of justice would take cognizance."

No fact is alleged showing discrimination as to Wisconsin producers and processors. Neither can the act be reasonably construed to permit or authorize the destruction of any milk hauled in tank trailers into Tennessee. The fallacies in such reasoning are apparent. Such assumed facts are highly speculative and conjectural.

In effect the statements quoted admit that Wisconsin has suffered no injury and that Tennessee has done nothing to injure the Wisconsin dairy industry or to reduce her revenues. The conclusion to be drawn from the argument is that, if the motion should be granted and the petition filed, there is no factual situation which can be proved to show an unconstitutional application of the statute. Thus, the

well-known rule that one who attacks the constitutionality of a statute has the burden of showing its unconstitutionality will be subverted. **Corporation Commission of Oklahoma v. Lowe,** supra; **Williams v. Moore and City Council of Baltimore,** 53 S. Ct. 431, 289 U. S. 36, 27 L. Ed. 1015; **Pacific States Box and Basket Company v. White,** 56 S. Ct. 159, 296 U. S. 176, 80 L. Ed. 138, 101 A. L. R. 853; **Bourjois Inc. v. Chapman,** 57 S. Ct. 691, 301 U. S. 183, 81 L. Ed. 1027. The rule has been applied also where there has been a collision of state interests. **State Farm Mutual Automobile Insurance Co. v. Duel,** 65 S. Ct. 573, 324 U. S. 154, 89 L. Ed. 812, rehearing denied, 65 S. Ct. 856, 324 U. S. 887, 89 L. Ed. 1436.

There must be facts alleged which state a cause of action under accepted legal practices. The amount, if any, of which the state's revenues might be adversely affected is highly speculative and, at the most, the interests of Wisconsin are remote and indirect. This is fatal. **Minnesota v. Northern Securities Company,** 194 U. S. 48, 24 S. Ct. 598, 48 L. Ed. 870.

In the final analysis this is an attempt by the State of Wisconsin to strike down a Tennessee statute because it contravenes the notions of certain public officials of Wisconsin as to what the public policy of Tennessee should be. But the mere fact that a state moves to be permitted to file its petition is insufficient within itself to invoke the original jurisdiction of this Court. **Florida v. Melon,** 273 U. S. 12, 47 S. Ct. 265, 266, 71 L. Ed. 511.

CONCLUSION.

The State of Tennessee respectfully insists that Chapter 74 of its Public Acts of 1955 is a valid and constitutional enactment and that it is not offensive under either the commerce clause or the Fourteenth Amendment to the Constitution of the United States.

We further contend that the State of Wisconsin is not a proper party to maintain this suit, and that to permit the complaint to be filed will have the effect of foreclosing an inquiry into matters of vital concern. If Wisconsin is permitted to proceed, this action will resolve itself into an attack upon a statute duly enacted by a sovereign State, and the issues will be presented only upon a vague and hypothetical basis.

The State of Tennessee respectfully insists that Wisconsin should be denied leave to file this complaint.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
ALLISON B. HUMPHREYS, Jr.
Solicitor General,
KNOX BIGHAM,
Assistant Attorney General,
JAMES M. GLASGOW,
Assistant Attorney General,
Attorneys for State of Tennessee.

Post Office Address:
Supreme Court Building,
401 Seventh Avenue North,
Nashville 3, Tennessee.

Certificate of Service.

The undersigned, a member of the bar of the Supreme Court of the United States and one of the counsel of record for the defendant, hereby certifies:

That on the 5th day of December, 1955, he served the within and foregoing reply brief upon the sovereign State of Wisconsin, the movant and plaintiff in said action, in the following manner, as prescribed by Rules 9 and 33 of said Court:

He deposited at the post office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing reply brief, securely enclosed in an envelope, air mail postage duly prepaid, addressed to each of the following officials of the said plaintiff State, respectively, at his post office address, as stated below, that is to say:

Honorable Walter J. Kohler,
Governor of the State of Wisconsin,
State Capitol,
Madison, Wisconsin.

Honorable Vernon W. Thompson,
Attorney General of the State of Wisconsin,
114 East,
State Capitol,
Madison 2, Wisconsin.

.....

Knox Bigham.

EXHIBIT.

(Copy)

In the
United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation, Plaintiff, v. George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee, Defendants.	No. 2015. Equitable Relief Requested.

COMPLAINT SEEKING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.

(Filed Apr. 20, 1955.)

Now comes the plaintiff, Dean Milk Company, an Illinois corporation, and presents its complaint against the defendants, George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee, and for cause of complaint shows:

1. That the defendant, George F. McCanless, is the duly elected and qualified Attorney General of the State of Tennessee and as such has the duty of enforcing the laws of the State; that the defendant, Buford Ellington, is the duly

appointed and qualified Commissioner of Agriculture of the State of Tennessee and as such has the duty, through and with the assistance of the Attorney General, of enforcing the laws falling within his Department of the State government; that the defendant, Murray T. Miles, is the State Dairy Commissioner, performing those duties in connection with the Department of Agriculture specifically within his division of that Department, including the enforcement of the laws regarding dairies, milk and milk products; that all of the defendants are residents of, located in and having their principal offices in the County of Davidson, State of Tennessee.

2. That the jurisdiction of the Court is based upon Sections 1332 and 1338 of Title 28 of the United States Code, establishing in this Court original jurisdiction to hear actions between persons residing in different states and involving more than three thousand and no/100 dollars ($3,000.00), and actions arising under the Constitution or laws of the United States and involving more than three thousand and no/100 dollars ($3,000.00); that this complaint seeks a declaratory judgment and injunctive relief as is provided for in Sections 2201 and 2202 of Title 28 of the United States Code; that the controversy arises under and involves Article I, Section 8, Clause 3, and Article VI, Section 2, of the Constitution of the United States, Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the Anti-Trust laws of the United States, Sections 1-26, Title 15, of the United States Code; that this controversy involves more than three thousand dollars exclusive of interest and costs.

3. That plaintiff, Dean Milk Company, is a corporation existing under and by the authority of the laws of the State of Illinois, with its principal place of business in Franklin Park, Illinois, and is engaged in the fluid milk business in the City of Memphis and its environs in the State of Ten-

nessee; that plaintiff owns and operates a milk processing and bottling plant at Conway, Arkansas, and is engaged in the fluid milk business in the States of Arkansas, Illinois, Kentucky, Missouri, Indiana and Wisconsin; that since October 19, 1952, plaintiff has been and is now engaged in distributing and selling fluid milk and milk products to retail stores in the City of Memphis and its environs, and that such sales of fluid milk by plaintiff, Dean Milk Company, have, in large part, been made through its distributor, Ray C. Schutt, doing business as "Dean Milk of Memphis"; that the plaintiff desires and intends to engage in the fluid milk business in other marketing areas in the State of Tennessee; that said fluid milk business as carried on by the plaintiff constitutes interstate commerce in that it consists of the purchase of fluid milk and cream from producers in Arkansas, Missouri, Oklahoma, Illinois, Wisconsin and Tennessee, transporting said fluid milk and cream to Conway, Arkansas, commingling the same, and then pasteurizing and bottling said milk in paper containers at plaintiff's processing and bottling plant at Conway, Arkansas, and then transporting said fluid milk and milk products for sale to retail stores in Memphis and its environs; that there is thus a continuous flow of fluid milk and cream from producers, through the bottling and processing plant of the plaintiff, to retail stores for sale to the ultimate consumers thereof, which altogether constitutes interstate commerce in fluid milk and cream originating in states other than Tennessee; that the gross volume of business of Dean Milk Company in distributing and selling milk and milk products in Memphis, Tennessee, and its environs is in excess of $70,000.00 per month.

4. That the General Assembly of the State of Tennessee, on February 22, 1955, enacted a law entitled "An Act to Regulate the Sale of Milk and Milk Products"; that the said law was approved by the Governor of the State of Tennessee on February 23, 1955, and the law by its express

terms has been in effect from and after its passage; that a true and correct copy of said law (sometimes referred to hereinafter as H. B. No. 389) is attached to this complaint as Exhibit A and by this reference is incorporated herein and made a part hereof.

5. That Sections 1, 2, 3 and 4 of H. B. No. 389, and each of them, violate the Constitution of the United States and the Constitution of the State of Tennessee, as is more fully set out hereinafter; that the plaintiff, Dean Milk Company, has been notified by officials of the State of Tennessee charged with the enforcement of H. B. No. 389 that the statute applies to the business of plaintiff, Dean Milk Company, and that the defendants have been and are threatening to enforce the provisions of H. B. No. 389 against plaintiff, Dean Milk Company; and that H. B. No. 389 constitutes a present and existing threat against the business and officers and agents of the plaintiff in the sale of fluid milk and milk products in interstate commerce to persons located within the State of Tennessee, and is a present and existing barrier against plaintiff's intentions to engage in the fluid milk business in other areas in the State of Tennessee.

6. That H. B. No. 389 contains no statement of any legislative purpose, and that the law is unreasonable, arbitrary and capricious and bears no real or substantial relation to any legitimate or proper purpose and constitutes an unnecessary and unwarranted interference with the individual liberty of the plaintiff; that the statute does not purport to regulate the quality of milk or milk products or in any way to protect the health and welfare of the people of the State of Tennessee by preventing the sale of impure or improperly processed or misbranded fluid milk or milk products; that the statute is not designed to promote competition or regulate competitive practices so as to benefit the health and welfare of the people of the State of Tennessee, but is instead promotive of monopoly and unreasonably

high prices, all in derogation of the best interests of the people of the State of Tennessee.

7. That H. B. No. 389, by delegating to milk processors or manufacturers engaged in business of selling at wholesale or retail fluid milk and milk products in the State of Tennessee at the date of the enactment of the said bill or thereafter first entering a marketing area complete and unfettered control over the price at which fluid milk or milk products may be sold by plaintiff in areas in which said processors and manufacturers are doing business, creates the power to exclude or prevent free competition or the entry into any marketing areas by plaintiff or any person engaged in the business of selling fluid milk or milk products, such as plaintiff, and thereby creates in such processors and manufacturers a monopoly in violation of Article I, Section 22, of the Constitution of the State of Tennessee.

8. That the statute delegates to the processors and manufacturers engaged in the selling of fluid milk and milk products in any market area in the State of Tennessee the power to legislate and fix prices in any manner said processors and manufacturers see fit; that no standard or guide or limitation on said power to legislate wrongfully delegated to said processors and manufacturers is established in H. B. No. 389; that the Legislature, in enacting H. B. No. 389, has unconstitutionally abdicated and delegated its legislative powers to private persons in violation of Sections 1 and 3 of Article II of the Constitution of the State of Tennessee; that the Legislature has abandoned its proper functions and delegated to the Commissioner of Agriculture, with no proper standards to guide or limit the Commissioner, the power to designate and establish "marketing areas" as referred to in H. B. No. 389; that said law gives no consideration to the quality or grade of the competitive products sold; that no standard is established by which plaintiff can determine what constitutes "prevailing price" as referred to in H. B. No. 389.

9. That H. B. No. 389 deprives the plaintiff, Dean Milk Company, of its liberty, privileges and property without due process of law; that the Legislature, in enacting H. B. No. 389, has unlawfully delegated to private persons the right to control and regulate the manner and method in which plaintiff may engage in the sale of fluid milk or milk products and the right to control the disposition of property by the plaintiff and to make any disposition of such property by the plaintiff other than that permitted from time to time by said undeterminate group of private persons a crime, and that the said law is so vague that it provides no reasonable standard so that plaintiff or any other person similarly situated can determine what conduct may be construed to be violative thereof all in violation of Amendment Fourteen, Section 1, of the United States Constitution, and Article I, Section 8, and Article XI, Section 8, of the Tennessee Constitution.

10. That said statute, H. B. No. 389, is further unconstitutional in that it (a) unlawfully and without due process of law deprives any processor or manufacturers charged with a violation thereof of the presumption of innocence until proven guilty; and (b) of the constitutional right of such processor or manufacturer to refrain from testifying in a criminal matter against his own interests, all in violation of Section 1 of Amendment XIV and Amendment V of the United States Constitution.

11. That the business of the plaintiff in the sale of fluid milk and milk products to persons located within the State of Tennessee constitutes interstate commerce; and that the power to regulate interstate commerce is vested in the Congress of the United States by Article I, Section 8, Clause 3, and Article VI, Section 2, of the Constitution of the United States; that the Congress of the United States has completely occupied the field of regulating pricing practices and other trade practices in interstate commerce by the

enactment of Sections 1-26 of Title 15 of the United States Code; H. B. No. 389 is in direct conflict with and contravention of the provisions of the Constitution and statutes above mentioned and is a direct burden upon interstate commerce; that discounts, rebates, advertising allowances and other pricing practices which the Congress of the United States has established as proper trade practices are arbitrarily precluded by H. B. No. 389.

Wherefore, plaintiff prays the Court for a judgment, declaring:

1. The statute, H. B. No. 389, unconstitutional and void and without effect as to the business of the plaintiff or others similarly situated;

2. That the defendants, their agents and attorneys be enjoined from enforcing or seeking to enforce or commencing any actions for the enforcement of the statute, H. B. No. 389; and

3. That the plaintiff have such other relief as it may be entitled to in the premises.

Robert W. Sturdivant,
Thomas C. McConnell,
Longstreet Heiskell,
Attorneys for Plaintiff.

McConnell, Lutkin, Van Hook & Paschen,
134 South LaSalle Street,
Chicago, Illinois.

Chandler, Shepherd, Heiskell & Williams,
1711 First National Bank Building,
Memphis, Tennessee.

Trabue & Sturdivant,
816 Nashville Trust Building,
Nashville 3, Tennessee.

United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation,
Plaintiff,
v.
George F. McCanless, Attorney General of the State of Tennessee, et al.,
Defendants.

Civil Action.
File No. 2015.

ORDER.

(Received for Entry Oct. 10, 1955.)

In this cause, upon motion of the plaintiff and by consent of the parties, paragraph 2 of the complaint is amended by deleting from the first sentence thereof Section 1338 of Title 28 of the United States Code and adding in lieu thereof Sections 1331 and 1337 of Title 28 of the United States Code.

Elmer D. Davies,
United States District Judge.

Robert W. Sturdivant,
Attorney for Plaintiff.

James M. Glasgow,
Attorney for Defendant.

United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation,
Plaintiff,

v.

George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee,
Defendants.

Civil Action.
File No. 2015.

MOTION TO DISMISS.
(Filed May 10, 1955.)

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court has no jurisdiction over the subject matter.

3. To dismiss the action on the ground that the Court lacks jurisdiction because the amount actually in controversy is less than $3,000.00 exclusive of interest and costs.

Knox Bigham,
Knox Bigham,
Assistant Attorney General, State of Tennessee,

James M. Glasgow,
James M. Glasgow,
Assistant Attorney General, State of Tennessee,

Supreme Court Building,
Nashville 3, Tennessee,

Attorneys for Defendants.

NOTICE OF MOTION.

To: McConnell, Lutkin, Van Hook and Paschen,
Attorneys for Plaintiff,
134 So. LaSalle Street,
Chicago, Illinois.

Please take notice that the undersigned will bring the above motion on for a hearing before this Court at the court room in the United States Courthouse in Nashville on the 23 day of May, 1955, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Knox Bigham,
Knox Bigham,
Assistant Attorney General, State of Tennessee,
Supreme Court Building,
Nashville 3, Tennessee,
Attorney for Defendants.

I certify that I have served a copy of this Motion and Notice on Attorneys for plaintiff by mailing a true copy of the same to McConnell, Lutkin, Van Hook and Paschen, 134 So. LaSalle Street, Chicago, Illinois, this 9 day of May, 1955.

/s/ Knox Bigham,
Knox Bigham,
Assistant Attorney General.

(Seal)

Filed
May 10, 1955
L. B. Ormes, Clerk,
By: S. E. Wasson, D. C.

United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation,
Plaintiff,

v.

George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee,
Defendants.

Civil Action.
File No. 2015.

ORDER ON MOTION.

(Received for Entry Aug. 4, 1955.)

This cause came on to be heard before the Honorable Elmer Davies, Judge, upon motion of defendants to dismiss the complaint filed in the cause, and after argument of counsel the Court was pleased to overrule said motion and grant to the defendants thirty days from the date hereof to further plead to said complaint with leave granted said defendants to rely upon the grounds of said motion in their answer; and it is accordingly so Ordered, Adjudged and Decreed:

And it further appearing to the Court that there is herein involved the constitutionality of a statute of the State of Tennessee, the Court is of the opinion that it is proper that the matter be heard before a three-Judge Court pursuant to Section 2281 of Title 28 of U. S. Code Annotated; it is accordingly ordered that the cause be set

for hearing in due course before a Court consisting of three Judges.

Entered at Nashville this 4th day of August, 1955.

Elmer D. Davies,
United States District Judge.

Robert W. Sturdivant,
Attorney for Plaintiff.

Knox Bigham,
Attorney for Defendants.

United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation, Plaintiff, v. George F. McCanless, Attorney General of the State of Tennessee, et al., Defendants.	Civil Action. File 2015.

ANSWER.
(Filed Aug. 31, 1955.)

Come now the defendants, George F. McCanless, Attorney General of the State of Tennessee; Buford Ellington, Commissioner of Agriculture of the State of Tennessee, and Murray T. Miles, State Dairy Commissioner of the State of Tennessee, and for answer to the complaint filed against them in this cause, say:

I.

Plaintiff has failed to state a claim upon which relief can be granted.

II.

The Court has no jurisdiction over the subject matter, because:

1. There is no justiciable controversy between the parties.

2. Plaintiff is not adversely affected by House Bill No. 389, the same being Chapter 74 of the Public Acts of Tennessee of 1955.

3. The amount in controversy is less than $3,000.00, exclusive of interest and costs.

4. Plaintiff seeks only an advisory opinion based upon a hypothetical state of facts.

III.

Defendants are not advised as to the details of the manner in which plaintiff conducts its business, but insofar as

plaintiff's allegations with reference to such details are relevant to this suit, demand strict proof of the same.

IV.

Defendants admit the passage of Chapter 74 of the Public Acts of Tennessee of 1955, but deny that any of defendants has instituted any action against plaintiff for violation of said Act, and further deny that any of defendants has threatened to institute such action.

V.

Defendants deny that Chapter 74 of the Public Acts of Tennessee of 1955 is unconstitutional for any of the reasons stated in the complaint, and insist that it is a valid and constitutional enactment in every respect.

Knox Bigham,
Assistant Attorney General, State of Tennessee,

James M. Glasgow,
Assistant Attorney General, State of Tennessee,

Supreme Court Building,
Nashville 3, Tennessee.

This is to certify that a copy of this Answer has been served upon counsel for plaintiff by mailing the same to McConnell, Lutkin, Van Hook & Paschen, Attorneys at Law, 134 South LaSalle Street, Chicago, Illinois.

Knox Bigham,
Assistant Attorney General, State of Tennessee.

(Seal)

Filed
Aug. 31, 1955
L. B. Ormes, Clerk
By: S. E. Wasson, D. C.

United States District Court
For the Middle District of Tennessee,
Nashville Division.

Dean Milk Company, a Corporation,
Plaintiff,

v.

George F. McCanless, Attorney General of the State of Tennessee, et al.,
Defendants.

Civil Action.
File No. 2015.

APPLICATION FOR PRELIMINARY HEARING.

(Filed Sept. 8, 1955.)

Come now the defendants and make application that the defenses numbered I and II in their answer be determined before trial.

Knox Bigham,
Assistant Attorney General,

James M. Glasgow,
Assistant Attorney General,

Supreme Court Building,
Nashville 3, Tennessee.

I certify that I have served a copy of this application upon counsel for plaintiff by mailing the same to McConnell, Lutkin, Van Hook & Paschen, 134 So. LaSalle St., Chicago, Illinois; Chandler, Shepherd, Heiskell & Williams, 1711 First National Bank Bldg., Memphis, Tennessee Trabue & Sturdivant, Nashville Trust Bldg., Nashville, Tennessee.

Knox Bigham,
Assistant Attorney General.

(Seal)

Filed
Sept. 8, 1955
L. B. Ormes, Clerk
By: S. E. Wasson, D. C.

State of Tennessee, }
County of Davidson. }

This is to certify that the foregoing consists of a full, true and correct copy of the Complaint, except for Exhibit A to the same, which is a copy of Chapter 74 of the Public Acts of Tennessee of 1955 and is not copied herein, and other pleadings and orders on file in this Court in the case of Dean Milk Company v. George F. McCanless et al., Docket No. 2015, and that said case is now pending.

Witness my hand and the Official Seal of this Court this the 8th day of December, 1955.

L. B. Ormes,
Clerk,
By S. E. Wasson,
(Seal) Deputy.

This is to certify that L. B. Ormes was at the time of the execution of the foregoing certification the duly appointed, qualified and acting Clerk of the U. S. District Court for the Middle District of Tennessee, and that S. E. Wasson, whose genuine signature appears above, was at such time his duly appointed, acting and qualified Deputy, and that the foregoing attestation is in due form.

William E. Miller,
(Seal) Judge, U. S. District Court for the
Middle District of Tennessee.

FILED
DEC 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

No. 13 Original

October Term, 1955

STATE OF WISCONSIN,
Plaintiff,

v.

STATE OF TENNESSEE,
Defendant.

REPLY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

VERNON W. THOMSON
Attorney General

STEWART G. HONECK
Deputy Attorney General

ROY G. TULANE
Assistant Attorney General

GEORGE F. SIEKER
Assistant Attorney General

THE GILMAN PRESS, MADISON, WISCONSIN

IN THE

Supreme Court of the United States

No. 13 Original

October Term, 1955

STATE OF WISCONSIN,

Plaintiff,

v.

STATE OF TENNESSEE,

Defendant.

REPLY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

We find no rule that either authorizes or prohibits a reply brief in an action seeking to invoke the original jurisdiction of this court. Accordingly, we are tendering this short statement for such use as the court may choose to make of it.

In reply to the brief in opposition to the motion, the State of Wisconsin respectfully suggests to this Honorable Court:

Tennessee has not filed any pleading in this action. Hence, we regard the brief filed by Tennessee as, in effect, a demurrer. Therefore, the allegations of the proposed complaint stand uncontroverted and as verities in this action.

(1) "the provisions of Public Chapter No. 74 of the Laws of Tennessee of 1955 * * * will * * * hamper,

impede and destroy interstate commerce in milk between the producers in the State of Wisconsin, and the consuming public in the State of Tennessee";

(2) "The State of Tennessee * * * has made provisions for the enforcement of said chapter * * *;

(3) "(Public Chapter 74) * * * discriminates against producers in the State of Wisconsin * * *"

(4) "substantial quantities of milk produced in Wisconsin have been sold in Tennessee."

(5) "any interference with the development of the widest possible market for fluid milk * * * tends to depress the price in Wisconsin of all milk * * *"

(6) "the owners and operators of the 107,000 dairy farms in Wisconsin * * * with their families constitute about one-seventh of the total population * * *"

While Tennessee has answered in a most scholarly and lawyer-like manner our proposed complaint filed herein, Tennessee has glossed over the critical point at issue and that is the significant complaint that although the Tennessee statute involved herein does make certain acts, namely the selling of milk at less than the prevailing market price, illegal only when done with the intent to monopolize, *the mere doing* of such acts is prima facie evidence of the intent. The fact that *some* Tennessee producers and shippers *may* also be subject to the same which *necessarily* applies to *all* Wisconsin producers and shippers does not remove the obvious burden on interstate commerce which this statute creates.

The defendant cites *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346 (which was a case involving only producers residing within one state) as sustaining its position that the statute here in question is not invalid. We respectfully suggest to the Court that the Pennsylvania statute involved in that case applied equally to all Pennsylvania producers and shippers and that no question involving a foreign shipper was there presented. In short, in contrast with the instant case, it did not discriminate against milk shipped in interstate commerce.

In reply to the defendant's second argument, we respectfully suggest that it is dependent upon the first. Here the State of Wisconsin has adequately alleged the injury that is certain to result from the provisions for the enforcement of the law in question and the State of Tennessee has denied neither the certain injury nor the provisions for enforcement. The distinction made between the instant case and that in *Pennsylvania v. West Virginia*, 262 U. S. 553 which is based upon the present law's application only to the doing of "certain acts with a certain intent," is unreal in that the law makes the very doing of such acts by Wisconsin producers and shippers *prima facie evidence* of the improper intent. This presumption does not apply to local producers and shippers.

In reply to the defendant's third argument, the State of Wisconsin calls attention to the prima facie nature of the discrimination and the uncontroverted allegations of the effects such discrimination is certain to produce. If the defendant proposes to take the position that the enforcement will not injure the State of Wisconsin or its dairy industry, it should controvert the facts alleged by filing

an answer herein. That will then properly raise an issue of fact which can be determined in the appropriate manner.

CONCLUSION

The State of Wisconsin respectfully submits that leave to file the complaint herein should be granted.

Respectfully submitted,

VERNON W. THOMSON
Attorney General

STEWART G. HONECK
Deputy Attorney General

ROY G. TULANE
Assistant Attorney General

GEORGE F. SIEKER
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the 19th day of December, 1955, he served the within and foregoing "Reply Brief in Support of Motion for Leave to File Complaint" upon the sovereign State of Tennessee, the defendant in said action, in the following manner, as prescribed by Rules 9 and 33 of said Court:

He deposited at the post office at Madison, Dane County, Wisconsin, two copies of the within and foregoing Reply Brief, securely enclosed in an envelope, air mail postage duly prepaid, addressed to attorney for said defendant State, at his post office address, as stated below, that is to say:

Honorable George F. McCanless
Attorney General of the State of Tennessee
State Supreme Court Building
Nashville, Tennessee

.....

Stewart G. Honeck

Decisions Per Curiam.

No. 13, Original. WISCONSIN *v.* TENNESSEE. On motion for leave to file complaint. Argued January 23, 1956. Decided January 30, 1956. *Per Curiam:* The motion for leave to file the complaint is denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this motion. *Vernon W. Thomson,* Attorney General, argued the cause for the State of Wisconsin, plaintiff. With him on the brief were *Stewart G. Honeck,* Deputy Attorney General, and *Roy G. Tulane* and *George F. Sieker,* Assistant Attorneys General. *Knox Bigham,* Assistant Attorney General, argued the cause for the State of Tennessee, defendant. With him on the brief

were *George F. McCanless*, Attorney General, *Allison B. Humphreys, Jr.*, Solicitor General, and *James M. Glasgow*, Assistant Attorney General.